DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Business and Administrative Law
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330 Independence Ave., S.W.
Washington, D.C. 20201

August 9, 1990

NOTE TO RICH McCLOSKEY

Re: Your Request for Opinion 89-6, on IHS Transfers of Land and/or Buildings Containing Hazardous Materials

In accordance with your telephone conversation yesterday, I am sending you a copy of our draft memorandum on the above-referenced subject. Included are all of the attachments to this document.

This draft memorandum is close to being in final form and we plan to complete it and send it to you soon. In the meantime, we thought that the information contained herein should prove useful to IHS.

Skip Mancuso

Skip Mancuso

Attachments

cc: Bill Pearson, IHS (draft memorandum, w/o attachments)
Duke McCloud, OGC (draft memorandum, w/o attachments)
Ron Guttmann, OGC (draft memorandum, w/o attachments)

DRAFT

August 8, 1990

MEMORANDUM

TO: Richard J. McCloskey, Director
Division of Legislation and Regulation
Office of Planning, Evaluation and Litigation
Indian Health Service

FROM: Ronald B. Guttmann, Chief
Business Law Branch
Business and Administrative Law Division

SUBJECT: Transfers of Federal Land and/or Buildings
Containing Hazardous Materials

This is in response to your Request For Opinion 89-6.

I apologize for the delay in providing you with this memorandum, but the issues you have raised are complex and required a great deal of research. Further, after beginning our research, we discovered that the Environmental Protection Agency (EPA) was soon expected to issue a very relevant final regulation entitled "Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property." These regulations were published in the Federal Register on April 16, 1990, and are discussed in this memorandum.

The basic issue raised by the Indian Health Service (IHS) is the extent of its liability when it transfers, or has already transferred, land and/or buildings that are subsequently found to be contaminated with hazardous materials. Of special interest is the transfer of buildings that include asbestos containing materials, in particular, the library building in Red Lake, Minnesota. Further, IHS is interested in whether such liability may be apportioned, if more than one Federal agency is responsible for the contamination and/or a transferror of the property, e.g., when IHS transfers real property to Indian tribes through the Bureau of Indian Affairs (BIA). IHS has also requested our views on the appropriations issues that may arise from any such liability, especially the funding of any corrective actions for facilities to which it has transferred ownership. Finally, IHS has asked for our opinion on the effect of the recent decision in Blue Legs v. United States, 867 F.2d 1094 (8th Cir. 1989), on any IHS duty to clean up contaminated property.

Because of the broad nature of the questions raised by IHS, our memorandum can only provide a general statement of the law. In order to provide IHS with more specific advice, we will require specific facts and questions regarding the particular land and/or building to be transferred, i.e., the property interest to be conveyed, the method of conveyance to be used and the type of hazardous substance involved.

I. Generally, IHS Facilities Must Comply With All Federal and Related State, Interstate And Local Environmental Laws

Generally, IHS facilities must comply with all applicable Federal pollution control laws. Further, since most major Federal environmental laws contain broad waivers of sovereign immunity, IHS must generally comply with State, interstate and local pollution control requirements as well.

The EPA's manual, entitled "Federal Facilities Compliance Strategy" (Yellow Book), a copy of which is attached hereto at Tab A, provides an excellent summary of all of the relevant major Federal environmental laws and Executive Orders and generally explains their applicability to Federal facilities. See pages II-1 through II-9 and appendices A and B. That summary includes a brief discussion of the general Federal approach to environmental regulation, which provides for a heavy reliance on State, interstate and local pollution laws. Of special significance is Executive Order 12088, (1978), entitled "Federal Compliance With Pollution Control Standards," which established the executive branch process for ensuring Federal agency compliance with all applicable pollution control requirements. See section III. of this memorandum for a more detailed discussion of this Order.

The general rule is especially relevant when considering IHS's concerns about buildings with asbestos containing materials. For

example, the Clean Air Act (CAA), 42 U.S.C. § § 7401-7642, is made specifically applicable to Federal facilities, both procedurally and substantively by 42 U.S.C. § 7418. Section 7418 also subjects IHS facilities to all Federal, State, interstate and local requirements respecting air pollution, including those specifically related to asbestos. The primary applicable Federal asbestos control standards in the National Emission Standard for Asbestos, 40 CFR Part 61, Subpart M, which includes standards for the demolition and renovation of facilities containing asbestos, and is intended to limit its emission into the air. See, also, the Occupational Safety and Health Administration's standards for asbestos at 29 CFR § § 1910 & 1926.

II. Under The Comprehensive Environmental Response Compensation And Liability Act, And Various GSA Property Disposal Regulations, IHS Assumes Responsibilities And Potential Liabilities When It Transfers Lands And/Or Buildings On Which There Has Been Hazardous Substance Activity

A. Background

In order to address the broad real property transfer liability issues raised by IHS, we must first categorize the major types of IHS' transfers.

We understand that most of IHS' real property transactions involve transfers of excess IHS real property to the Department of the Interior (DOI), utilizing the General Services Administration (GSA) property disposal procedures, at 41 CFR Part 101-47. These transfers to DOI are typically accomplished in one

of two ways. The first means is under the authority in the delegation from GSA to DOI and HHS, codified at 41 CFR Part 101-47.604, which provides for the transfer and retransfer of property between DOI and HHS, for administration of Indian functions. The other method is under 40 U.S.C. § 483(a)(2), which authorizes the transfer to DOI of Federal excess real property, within an Indian reservation, for the benefit and use of Indians. It is our understanding that, for real property transferred by IHS, DOI then usually conveys such real property to the appropriate Indian tribe, as provided in 25 U.S.C. § 443a.

On occasion, IHS is also provided with specific statutory authority to convey ownership of government-owned land to a non-federal entity. E.g., the land swap in Anchorage Alaska, by which IHS land was conveyed by deed to the Tudor Fund.

With this background in mind, we will discuss the two primary Federal authorities which specifically apply when IHS intends to transfer land and/or buildings containing hazardous substances. These authorities are:

(1) The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq., which is intended to correct existing environmental contamination, including that which occurs at Federal

facilities and which includes specific provisions dealing with Federal real property transfers.

(2) Various GSA requirements, codified at 41 CFR Part 101-47, dealing with the utilization and disposal of excess government-owned real property, which may be contaminated and/or contain hazardous substances.

Additionally, as noted above, IHS generally must also comply with all Federal, State, interstate and local environmental laws. Accordingly, IHS should insure that prior to and at the time of transfer the property to be transferred is in full compliance with all such applicable laws, or separate civil and/or criminal liability may be incurred.

B. CERCLA

1. CERCLA's Waiver of Sovereign Immunity

CERCLA, Section 120, entitled "Federal facilities," codified at 42 U.S.C. 9620, a copy of which is attached hereto at Tab B, contains a broad waiver of sovereign immunity. Subsection (a)(1) provides as follows:

> Each department, agency, and instrumentality of the United States (including the executive, legislative and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

42 U.S.C. § 9620(a)(1).

Section 120 also specifically subjects Federal facilities to certain Federal and State pollution control requirements. Subsection 120(a)(2), for example, imposes on Federal facilities all guidelines, rules, regulations and criteria applicable to CERCLA preliminary assessments and evaluations under the National Contingency Plan.[1] 42 U.S.C. § 9620(a)(2). Further, Subsection 120(a)(4) subjects Federal facilities to State laws concerning

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[1] The National Contingency Plan (NCP), which is intended to effectuate the response power and responsibilities of CERCLA, is required by 42 U.S.C. § 9605. The NCP, codified at 40 CFR Part 300, sets forth the basic standards that govern responses to releases of hazardous substances and the development of appropriate remedies, whether publicly or privately funded. The NCP includes the establishment of a preliminary assessment requirement for a release or threatened release. It also requires establishment of a National Priority List of sites to be decontaminated.

removal, as well as remedial and enforcement actions, under certain circumstances. It is also important to note that under 42 U.S.C. § 9659, authorizing citizen suits, any person may commence a civil action alleging the United States to be in violation of ". . . any standard, regulation, condition, requirement or order . . . (including any provision of an agreement under section 120 [42 U.S.C. § 9620], relating to Federal facilities) . . . ."

For purposes of CERCLA, "facility" is defined at 42 U.S.C. § 9601(9) to include ". . . any building, structure . . . site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located . . . ." Further, the discussion of the definition of "Federal facility" in the EPA Yellow Book, page III-1, makes clear that a Federal facility includes buildings, structures, land and other property owned by or leased to the Federal government. However, it should be pointed out that the EPA Yellow Book explains that ". . . American Indian lands (i.e. reservations), do not fall within EPA's definition of 'Federal facilities' and this compliance strategy does not apply to American Indian lands." Yellow Book, page III-2.[2] Accepting the Yellow Book's definition, it is our

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[2] The Yellow Book also refers to the "EPA Policy For The Administration Of Environmental Programs On Indian Reservations," and EPA's "Indian Policy Implementation Guidance", both of which were issued in November, 1984 and copies of which are attached hereto for your information, at Tab C. Further, please note that section 207 of the Superfund Amendments and Reauthorization Act of 1986, Public Law 99-499, a copy of which is also attached

view that the IHS buildings located on trust land are considered Federal facilities for purposes of CERCLA.

2. CERCLA's Notice Provisions

CERCLA, § 120(h)(1), requires all Federal agencies to provide notice of hazardous substance activity when they propose to sell or otherwise transfer specified Federal real property. This notice provision is set forth in the following terms:

> After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and

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at Tab C, requires that for some CERCLA purposes, Indian tribes will be treated substantially the same as States.

> quantity of such hazardous substance and notice of the time at which such storage, release or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

42 U.S.C. § 9620(h)(1).

The regulation implementing this CERCLA notice requirement, entitled "Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property," published at 55 Fed. Reg. 14207-14212, a copy of which is attached hereto at Tab D, was promulgated by EPA on April 16, 1990 and is effective on October 17, 1990. The regulation includes a number of very helpful explanatory provisions, including definitions for the terms "hazardous substance," "storage," "release" and "disposal." Further, it sets forth the minimum quantities of such hazardous substances necessary to make this regulation applicable.

Of particular relevance to IHS' real property transfer liability question is EPA's interpretation of a "transfer". 55 Fed. Reg. 14208-14209. The preamble discussion makes clear that the notice requirements apply to transfers of real property between Federal agencies, such as those between IHS and BIA, as well as to transfers to non-Federal entities.

The important concept of "real property" is also discussed. 55 Fed. Reg. 14209. Basically, EPA concluded that it would not attempt to define this term. Instead, it chose to rely primarily on the common law of the state in which the property lies in determining whether a particular ownership right constitutes "real property". Thus, EPA specifically elected not to address whether and to what extent leases and easements should be included among the types of property subject to this regulation.

Section F of the preamble states that EPA elected not to clarify whether the CERCLA notice requirement applies to asbestos containing products that are structurally integrated into any Federal buildings that are sold or transferred. However, in light of the fact that asbestos is already considered a hazardous substance under CERCLA, it is clear that this notice would apply to asbestos in IHS buildings when the asbestos is "stored," "released" or "disposed" of in the minimum quantities required to make the regulation applicable.[3] For a further discussion of asbestos in Federal buildings, see section II.B.4. dealing with CERCLA liability and, in particular, section II.C. dealing with applicable GSA regulations.

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[3] See, 42 U.S.C. 9601(14), which defines hazardous substance. See, also, United States v. Metate Asbestos Corporation, 584 F. Supp. 1143 (D. Ariz., 1984) in which asbestos was specifically held to be a hazardous substance under CERCLA.

3. CERCLA's Requirements for Deeds

CERCLA, § 120(h)(3), entitled "Contents of certain deeds," requires Federal agencies to include, in the deed for the conveyance of any specified real property owned by the United States, certain information about hazardous substance activity and a covenant warranting all necessary remedial action. These CERCLA deed requirements are effective on October 17, 1990, and provide as follows:

> . . . in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain --
>
> > (A) to the extent such information is available on the basis of a complete search of agency files --

(i) a notice of the type and quantity of such hazardous substances,

(ii) notice of the time at which such storage, release, or disposal took place, and

(iii) a description of the remedial action taken, if any, and

(B) a covenant warranting that --

(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

The requirements of subparagraph (B) shall

> not apply in any case in which the person or entity to whom the property is transferred is a potentially responsible party with respect to such real property.

42 U.S.C. § 9620(h)(3).

EPA has taken the position that, since there is no statutory requirement that it promulgate rules to implement this section, it does not plan to do so.[4] It is our opinion, however, that, since many of the terms used in this section are identical to those in the CERCLA section 120(h)(1) notice provision discussed above, and because the basic purpose of each of these provisions is similar, it is advisable to at least consider the notice regulation, in addition to the applicable statutory provisions. For example, both these CERCLA provisions apply to the "storage," "release" and "disposal" of "hazardous substances" and both have similar notice provisions.

In circumstances when IHS transfers real property by deed, because of the covenant warranty provisions quoted above, IHS would be required, prior to transfer, to take all remedial actions necessary to protect human health and the environment

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[4] See EPA's Proposed Rule entitled "Reporting Hazardous Substance Activity When Transferring Federal Real Property," 53 Fed. Reg. 850-854, January 13, 1988, at page 850.

with respect to any hazardous substance remaining on the property. Further, IHS would also be responsible for any additional later remedial action found to be necessary. It is also our opinion that these provisions would apply to asbestos "stored", "released" or "disposed" of in IHS buildings, on land conveyed by a deed, if in excess of the minimum quantities discussed above.

4. CERCLA's Imposition of Civil Liability

CERCLA, § 107, entitled "Liability", codified at 42 U.S.C. § 9607, a copy of which is attached hereto at Tab E, imposes liability for the costs of cleanup of hazardous substance contamination, subject to some very limited defenses, on four broad categories of potentially responsible parties. This liability provision is made specifically applicable to Federal agencies, including IHS, by 42 U.S.C. § 9620, discussed in section II.B.1. above.

The operative portion of this section is as follows:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> (1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under section 104(i) [42 U.S.C. § 9604(i)].

42 U.S.C. § 9607(a).

In summary, in order to establish a prima facie case of liability under CERCLA, it must be established that there was:

(1) a release or threatened release;

(2) of a hazardous substance;

(3) from a facility;

(4) which has caused the incurrence of necessary response costs and;

(5) the defendant is an "owner," "operator," "generator" or "transporter."

Once these items are established a defendant is liable for:

(1) all the costs of removal and remedial actions taken by the United States, a State or an Indian tribe, which are not inconsistent with the NCP;

(2) any other necessary costs of response incurred by any other person consistent with the NCP;

(3) costs for injury, destruction or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss;

(4) the costs of any health assessment or health effects study carried out under CERCLA Section 104(i), 42 U.S.C. § 9604(i); and

(5) interest on the amounts in items (1) - (4) above.

Thus, under this liability provision, a State or an Indian tribe, which satisfies all of the criteria set forth above, may potentially recover against a Federal agency, such as IHS, "all costs of removal or remedial action incurred . . . not inconsistent with the national contingency plan" and a private party may potentially recover necessary response costs which are consistent with such plan. 42 U.S.C. § 9607(a)(4)(A) & (B). See, Cadillac Fairview/California, Inc. v. Dow Chemical Co., 840 F.2d 691 at 695 (9th Cir. 1988), attached at Tab F, where it was held that, under 42 U.S.C. § 9607(a), a private party was entitled to bring a civil action for damages for hazardous substance clean up response costs against the United States and others.

As previously stated, for purposes of CERCLA, asbestos is a hazardous substance. Therefore, consistent with 42 U.S.C. § 9607(a), the release or threatened release of asbestos may subject a responsible party to liability for removal or remedial actions. For example, in United States v. Metate Asbestos Corporation, 584 F. Supp. 1143 (D. Arizona 1984), the United States was successful in a CERCLA action for injunctive relief and cost recovery against a mining company for the costs of

cleaning up asbestos mines and mill wastes present in the soil of a mobile home site. It is important to note that, in this case, there was an actual release of asbestos into the soil.

CERCLA, however, does not appear to impose liability for the cleanup of asbestos structurally incorporated into buildings. In fact, CERCLA has been specifically interpreted to prohibit government-ordered cleanup of ". . . products which are part of the structure of and result in exposure within residential buildings or business or community structures. . . ." 42 U.S.C. § 9604(a)(3)(B). Thus, in Retirement Community Developers, Inc. v. Merine, 713 F. Supp 153 (D. Md. 1989), a copy of which is attached at Tab G, it was held that building renovators were not entitled to bring an action under 42 U.S.C. § 9607(a) to recover costs of removing asbestos which was part of the structure of the building. In this case there was no evidence of actual release or threatened release of asbestos into the environment. The Court, based on an analysis of 42 U.S.C. § 9604(a)(3)(B and its legislative history, concluded:

> . . . that Congress simply did not intend for CERCLA coverage to extend to the recovery of costs for the removal of asbestos installed in the construction of buildings.

713 F. Supp. 156.

5. CERCLA's Defenses

CERCLA, § 107(b), sets forth the following limited defenses to the imposition of liability:

> (b) **Defenses.** There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
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> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than [sic] one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and

> circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b).

Of these defenses, the most important is number 3, known as the "third party defense." It is applicable where the contamination is caused by a third party not contractually related to the defendant and the defendant can establish by a preponderance of the evidence that he took all reasonable precautions to prevent the contamination.

In addition to the third party defense, the 1986 amendments to CERCLA , known as the Superfund Amendments and Reauthorization Act of 1986, Public Law 99-499, provided a new definition of "contractual relationship," which excludes an "innocent purchaser" from the scope of liability under 42 U.S.C. § 9607(a). See 42 U.S.C. § 9601(35)(A). In order to establish this "innocent purchaser" defense, a landowner/defendant must prove by a preponderance of the evidence that he acquired the property after the disposal of the hazardous substance and, at the time of

acquisition, he did not know and had no reason to know that any hazardous substance had been disposed of on the property. In order to use this defense the landowner/defendant must also prove all of the other elements of the "third party defense," 42 U.S.C. § 9607(b)(3), discussed above.

In recognition of the potential risks to purchasers who buy contaminated property, and the difficulties in establishing the "innocent purchaser" defense, EPA has recently published some very useful guidance entitled "Selected Current Practices in Property Transfer Environmental Assessment" (September 1989). A primary objective of this document, a copy of which is attached hereto at Tab H, is to present information on how Federal agencies may minimize their potential environmental liability, by taking certain actions prior to or during the land acquisition process. This document should prove useful to IHS to help ensure that it does not unintentionally subject itself to CERCLA cleanup liability, either by buying from a non-Federal party, or by acquiring from another Federal agency a property that is already contaminated.

An owner, however, who realizes that a property is contaminated and then transfers it to an unsuspecting buyer is probably still liable under CERCLA. Thus, the CERCLA definition of "contractual relationship," discussed above, at 42 U.S.C. § 9601(35)(C), provides in pertinent part that:

> . . . [I]f the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

6. CERCLA's Strict Liability

The standard of liability imposed by CERCLA § 107 for cleanup costs is strict, i.e, it need not be proved that a potentially responsible party was negligent in order to establish a prima facie case. This standard is articulated indirectly in the CERCLA definition of liability, 42 U.S.C. § 9601(32), which imposes the same liability standard as the Clean Water Act (CWA), 33 U.S.C. § 1321. The CWA specifically provides for strict liability and, accordingly, the courts have imposed this same standard under CERCLA. See, for example, Tanglewood East Homeowners v. Charles Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988) and United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988). The CERCLA liability provision has also been held to apply retroactively, i.e., it ". . . imposes a

prospective obligation for the post-enactment environmental consequences of the defendants past acts. . . ." United States v. Monsanto Co., supra, at p. 173.

The courts have also held that, where the harm is indivisible, all parties who contributed to the contamination are jointly and severally responsible. Under this theory, any party may be held liable for all damages, rather than just its proportionate share. See, for example, United States v. Monsanto Co., supra, and U.S. v. Conservation Chemical Company, 589 F. Supp. 59, 63 (W.D. Mo. 1984).

7. CERCLA' Right of Contribution

CERCLA does, however, provide that, in civil proceedings in Federal Court, there is a right of contribution. Thus, 42 U.S.C. § 9613 provides in subsection (f)(1), entitled "Contribution," as follows:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under

> section 9607(a) of this title, . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines appropriate. . . .

42 U.S.C. § 9613(f)(1).

The party seeking apportionment, however, has the burden of establishing such a right. U.S. Conservation Chemical Company, supra.

It is also important to note that CERCLA section 107(e) effectively bars hold harmless or indemnification agreements which are intended to transfer to any other person liability imposed by CERCLA. See, 42 U.S.C. § 9607(e).

C. Applicable GSA Regulations

GSA's regulations, at 41 CFR Part 101-47, dealing with utilization and disposal of excess government-owned real property, are also applicable when IHS intends to transfer real property which may be contaminated with and/or contain hazardous substances.

The most relevant GSA regulation, a copy of which is attached at Tab I, requires agencies, when reporting property to GSA as

excess, to identify any property with asbestos-containing materials (ACM), including its type, location, condition, asbestos control measures already taken at such property and provide GSA with any available information on the costs and/or time necessary to remove any or all of the ACM. 53 Fed. Reg. 29892 - 29894 (August 6, 1988)[5] It is important to note, however, that this provision only applies where the asbestos-containing materials are still part of a building.[6] 53 Fed. Reg. 29893. For a building or structure which has allowed, or is allowing, asbestos to escape into the environment, the GSA asbestos regulation specifically states that CERCLA section 120(h) and the CERCLA notice provision discussed in section II.B.2. apply.

This GSA regulation also requires a specific form of notice of the presence of asbestos in any Invitation for Bids/Offers to Purchase being used by a Federal disposal agency. 53 Fed. Reg. 29894. This notice provision basically provides that the Government does not warrant the condition of the asbestos, and assumes no liability for damages in regard to it. Finally, the notice requires the purchaser to agree that, in its use and occupancy, it will comply with all Federal, State and local laws

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[5] This Federal Register document amends 41 CFR Part 101-47.

[6] The GSA language "part of the building," in our opinion has basically the same meaning as the CERCLA phrase "structure of . . . buildings," used in 42 U.S.C. § 9604(a)(3)(B) and in Retirement Community Developers, Inc. v. Merine, supra.

relating to asbestos. As noted above, however, CERCLA, 42 U.S.C. § 9607(e), effectively bars hold harmless and indemnification agreements. Therefore, CERCLA may effectively vitiate the GSA hold harmless language.

Another key regulation, entitled "Decontamination," is found in 41 CFR Part 101-47.401-4. This provision provides as follows:

> The holding agency[7] shall be responsible for all expense to the Government and for the supervision of decontamination of excess and surplus real property that has been subjected to contamination with hazardous materials of any sort. Extreme care must be exercised in the decontamination, and in the management and disposal of contaminated property in order to prevent such properties becoming a hazard to the general public. The disposal agency[8] shall be made cognizant of any and all inherent hazards involved relative to such property in order to protect the general public from hazards and to preclude the Government from any and all liability resulting from indiscriminate

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[7] "Holding agency" is defined in Subpart 101-47.1 as: "The Federal agency which has accountability for the property involved."

[8] "Disposal agency" is defined in Subpart 101-47.1 as: "The executive agency designated by the Administrator of General Services to dispose of surplus real property."

disposal or mishandling of contaminated property.

Although this provision places financial and other responsibility for any decontamination on the Federal agency initially accountable for such property, the presence of asbestos as part of the structure of a building, does not, in our opinion, constitute contamination which must be cleaned up. Indeed, as discussed in more detail in section II.B.4., supra, 42 U.S.C. § 9604(a)(3) has been interpreted to prohibit government-ordered cleanup of products, such as asbestos, which are a part of a building. Further, in Retirement Community Developers, Inc. v. Merine, supra, it was held that building renovators were not entitled to recover under CERCLA the costs of asbestos removal, where the asbestos was part of the building's structure and there was no actual release or threatened release. Therefore, while 41 CFR Part 101-47.401-4 does place certain responsibility on IHS to decontaminate property it transfers to BIA, this responsibility does not include the removal of asbestos which is merely part of the building and not released into the environment.

Further, 41 CFR Part 101-47.202-7, entitled "Reports involving contaminated property," imposes certain reporting requirements as follows:

> Any report of excess covering [sic] property which in its present condition is dangerous or hazardous to health and safety shall state the extent of such contamination, the plans for decontamination, and the extent to which the property may be used without further decontamination. In the case of properties containing asbestos-containing material and in lieu of the requirements of the foregoing provisions of § 101-47.202-7, see subsection 101-47.202 - 2(b)(9).

Also applicable is 41 CFR Part 101-47.501-3, entitled "Dangerous property." This regulation provides that:

> No property which is dangerous to public health or safety shall be abandoned, destroyed or donated to public bodies[9] pursuant to this subpart without first rendering such property innocuous or providing adequate safeguards therefor.

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[9] Subpart 101-47.5 defines "Public body" as: "Any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any political subdivision agency, or instrumentality of the foregoing.

III. Funding of Environmental Corrective Actions

A. Background

IHS has asked for our views on the appropriations issues that may arise from the funding of corrective actions, in particular, those that are required at facilities it no longer owns.

The budgetary aspects of funding corrective actions are briefly discussed in Executive Order 12088, (1978) entitled, "Federal Compliance With Pollution Control Standards," and Office of Management and Budget (OMB) Circular No. A-106 (12/31/74), entitled "Reporting Requirements In Connection With the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities." (These documents are included and discussed in the EPA Yellow Book. See pages II-8, V-6, VI-11 thru 12 and Appendix B for Executive Order 12088 and pages V-6 thru V-14 and Appendix G for OMB Circular A-106.)

Basically, the Executive Order requires that all Federal executive agency facilities comply with all applicable Federal, State, interstate and local pollution control laws and that Federal agencies cooperate and consult with EPA and state and local agencies in meeting their pollution control responsibilities. Further, EPA is authorized to monitor this compliance and to resolve conflicts within the Federal government and between the Federal and state agencies.

As part of the effort to achieve compliance, each Federal executive agency is required to submit to OMB, through EPA, an annual plan for control of environmental pollution. Among other matters, this plan is to include an annual cost estimate. The Executive Order also requires that the head of each executive agency ensure that sufficient funds for compliance with applicable pollution control requirements are requested in the agency budget.

The process for developing and maintaining these pollution control plans is described in OMB Circular No. A-106. Through this process, Federal agencies are to ensure Federal facility compliance with new regulatory requirements, as well as the correction of existing environmental problems. The development of such a plan allows an agency to analyze its current and projected pollution control funding requirements. This process is also intended to allow EPA to advise Federal agencies and OMB on obtaining the required funding in a manner which is consistent with the provisions of the Anti-Deficiency Act. As stated in the Yellow Book, the funding mechanisms often suggested by EPA include utilizing the established appropriation process, reprogramming of appropriated funds and requesting supplemental appropriations.

B. Impact of Availability of Funds In Complying With Applicable Pollution Control Standards

The Federal government's obligation to comply with all applicable environmental laws is generally not contingent upon the availability of funds. Further, Executive Order 12088 requires the head of each executive agency to prepare an environmental compliance plan which ensures that the agency's budget includes sufficient funds for compliance.

Obviously, unexpected problems and liabilities will occasionally arise which were not planned for in the normal budgetary process. These problems and liabilities, however, are somewhat similar to those that arise within this Department in other areas and, to the extent possible, should be dealt with in the same manner. For example, there are other situations in which HHS incurs unexpected financial liability and/or obligations as a result of Federal court litigation.

Typically, the Department is ordered to make a monetary payment and/or is ordered to take certain actions. In the case of a specific monetary judgment awarded by a Federal Court, the judgment is almost always paid out of a permanent, indefinite appropriation of the Department of Justice, which authorizes such payments. 31 U.S.C. § 1304.

With regard to non-monetary judgments, agencies are required to use existing appropriations to carry out the specific actions ordered by the court. It is noted that, while 31 U.S.C. § 1301 requires that appropriations shall be applied only to the objects for which they were made, agencies are allowed reasonable discretion in making the determination which appropriation to use. Their decision-making is normally guided by the "necessary expense" rule which, as articulated by the Comptroller General, provides:

> that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures or unless they are prohibited by law. . . .

6 Comp. Gen. 619,621 (1927).

The same rationale should apply to funding any court ordered actions against the Department in the environmental area. For example, in Blue Legs v. United States, supra, it is our understanding that the Court held IHS partially responsible for the costs of cleaning up the dumps in question but did not award any specific monetary damages to plaintiff. Rather, IHS was

required to share with BIA and the Tribe the costs of corrective action, as apportioned by the Court. In Blue Legs, since there was no monetary judgment for which the judgement fund would have been available, IHS must use other available appropriations, to carry out and/or fund the actions required of it by the Court. What other appropriations would be properly available to fund such court ordered actions would likely depend on the facts of the particular situation. Also, it is possible that IHS might have to seek a supplemental appropriation. If necessary, OGC is available to assist IHS in interpreting the various programmatic and appropriations laws involved in making such a funding decision.

Of course, prior to IHS funding corrective actions on buildings it no longer owns, it must first be established that IHS is at fault, i.e., has some legal obligation, and that IHS has properly available appropriations. For example, in the case of the Red Lake Library, for IHS to properly fund the asbestos removal, some underlying legal obligation for it to do so must be established. In order to make this determination, we would need to know a number of key facts, which are not presently available to us. For example, we would need to know to which Federal agency this building originally belonged, BIA or IHS. (We understand it may have been originally constructed as an IHS hospital). Also, we would need to know how, when and to whom this building was transferred or retransferred. Most importantly, much more

specific information must be supplied on the asbestos involved. For example, is the asbestos part of the building itself, what was the condition of the asbestos when IHS transferred the building to BIA, and what was its condition when the building was subsequently transferred to the Tribe.

By way of general advice, as discussed in sections II.B.4. and II.C., IHS would probably not be legally responsible for the removal of asbestos which is part of a building's structure, if the asbestos is not being released into the environment, at the time of the transfer. It is also clear, however, that IHS has a duty under the GSA asbestos regulation, and will soon have a duty under the CERCLA notice provision, discussed in section II.B.2., to fully inform BIA and GSA concerning the presence and condition of asbestos in buildings IHS transfers through the GSA procedures. Further, if IHS is the "holding agency" it, rather than the "disposal" agency, will be responsible under the GSA regulations for any required decontamination. Furthermore, IHS and BIA may be subject to civil suit under 42 U.S.C. 9607, discussed in Section II.B.4. above, if there was a release or disposal of asbestos or any other hazardous substance at the time IHS owned the building that caused plaintiff to incur CERCLA response costs.

Finally, we note that CERCLA and Executive Order 12088 both provide mechanisms for apportionment of liability among Federal agencies such as IHS and BIA. Please note that the EPA Yellow Book, pages VI-10 through VI-12, provides a discussion of the EPA Federal facilities dispute resolution process, which may, in some cases, be used to apportion clean-up responsibility between Federal agencies.

IV. Effects Of Blue Legs v. United States

IHS has also specifically requested our opinion on the effect of the recent decision in Blue Legs v. United States, 867 F.2d 1094 (8th Cir. 1989), on any IHS duty to clean up contaminated real property. In Blue Legs, individual members of an Indian tribe sued IHS, BIA and the Tribe for violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., in connection with the Tribe's operation of solid waste disposal sites on the reservation.[10] Generally, the IHS and BIA disposed of their solid waste[11] through contracts with the Tribe, which transported this material to, and placed it in, open dumps which

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[10] Under RCRA, which also contains a broad waiver of sovereign immunity, 42 U.S.C. § 6961, citizens are authorized to bring suits against any person, including the U.S. ". . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B)

[11] The waste at issue here is not hazardous waste.

the Tribe operated. In a few cases, however, BIA directly transported solid waste to the Tribe's dumps and IHS burned waste in open drums.

Plaintiffs sought an order compelling the defendants to dispose of their solid waste in accordance with RCRA, one of the primary objectives of which is to prohibit future open dumping on land. 42 U.S. C. § 6902(3). Further, RCRA prohibits ". . . any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste. . . ." 42 U.S.C. § 6945(a). RCRA also specifically subjects all Federal agencies to its solid waste disposal guidelines. 42 U.S.C. § § 6907 and 6964.

Jurisdiction was asserted against IHS and BIA under the Snyder Act, 25 U.S.C. § 13, the Indian Sanitation Facilities Act, 42 U.S.C. § 2004a, the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1601, et seq., and the government's general trust relationship with the Tribe.

The Federal defendants basic defense was that, because they had merely contracted with the Tribe for disposal of solid waste, they had no authority over or responsibility for the management

and operation of the solid waste facilities on the reservation. The Tribe contended that it had not waived its sovereign immunity.

The District Court found that BIA and IHS were bound by 42 U.S.C. § 6964, which requires any federal agency having ". . . jurisdiction over any real property or facility the operation or administration of which involves such agency in solid waste management activities" to comply with EPA solid waste management guidelines. The District Court also held that the Tribe did not have sovereign immunity for purposes of RCRA. The Court then held that BIA, IHS and the Tribe had contributed to the prohibited open dumping.

Accordingly, BIA and IHS were ordered, along with the Tribe, to share the responsibility for bringing all the solid waste disposal dump sites into compliance with RCRA.

On appeal, the court affirmed BIA's and IHS's responsibility on two bases. First, BIA and IHS were found to have contributed to open dumping by generating solid waste, contracting for its disposal and, in some instances, transporting the waste to the dumps, which were operated in violation of RCRA's "open dumping" prohibition. 42 U.S.C. § 6945. Second, their actions in collecting, separating and transporting solid waste were held to constitute a solid waste management practice which, because of

the open dumping, was also found to violate RCRA, 42 U.S.C. §§ 6945, 6964. Further, the court held that, by knowingly contributing to health hazards as set forth above, BIA and IHS violated their statutory duties under the Snyder Act, the Indian Health Care Improvement Act, and their general trust relationship with the Tribe.

The court also affirmed that the Tribe was not immune from suit and that it, too, was liable because it also generated the solid waste that was dumped at the sites it established and operated.

Clearly, the decision in Blue Legs may have long term effects on IHS because of the manner in which the court interpreted two separate provisions of RCRA, i.e., 42 U.S.C. §6945(a), prohibiting "open dumping," and 42 U.S.C. § 6964(a)(1)(A), by which IHS was held responsible for administration of the solid waste disposal facilities. These interpretations result in IHS being potentially legally responsible for solid waste disposal and management activities, when IHS is only a generator of solid waste. In effect, as a practical matter, these interpretations appear to require IHS to insure that all tribal solid waste disposal practices are in compliance with RCRA on any reservation at which IHS has a presence.

Failure to comply with RCRA could subject IHS to dramatic liability since, the court held in Blue Legs, the Government's ". . . duty to remedy the wrong is absolute and is not limited in proportion to [its] contribution to the problem." 867 F.2d Reporter 2d at 1100.

In the event that IHS believes that there are other situations developing on a reservation which could subject it to a Blue Legs type liability, this Division, in conjunction with the PHS Division, would be happy to review the matter.